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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re:

Amendment of 73.202(b)
Table of Allotments
FM Broadcast Stations
(Wallace, ID and Bigfork, MT)

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Docket No. 98-159

To: J. Bertron Withers, Jr.
Room 3-A264

PETITION FOR RECONSIDERATION

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June 11, 2001

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PETITION FOR RECONSIDERATION

Pursuant to 47 CFR 1.429¹, Bee Broadcasting, Inc. ("BBI") submits this Petition for Reconsideration of the Report and Order, RM-9290, released May 11, 2001 ("Decision").²

SUMMARY

The R&O granted a February 1998 proposal of Alpine Broadcasting, L.P. ("Alpine") -- then permittee KSIL-FM, Wallace, Idaho -- to move its unbuilt "Class C" FM station to Bigfork, MT as a "Class C" facility. The staff's May 11, 2001 Decision is fatally flawed in several material respects:

(a) the staff's Decision unlawfully held that Alpine's proposed move of KSIL-FM from an under-served area of Idaho to a well-served area of Montana is in the public interest even though, inter alia, Alpine defaulted on its evidentiary burden of producing the FCC-required "Gain/Loss" study for its proposed change of community (id. at para. 7-9)³;

(b) the staff's Decision unlawfully held that the re-allotment of KSIL-FM to the well-served community of Bigfork -- even after it became licensed earlier this year as a "Class C-2" FM station at Wallace, ID -- would result in an arrangement of FM allotments that is in the public interest, despite the fact that at least 150 persons in KSIL's Idaho service area would be left with ONLY ONE FULLTIME AURAL

¹ This Petition is timely filed within 30 days of the Public Notice in this proceeding, released May 11, 2001.

² BBI has "standing" under Section 1.429 (a) of the Commission's Rules inasmuch as BBI owns broadcast stations that serve Bigfork, MT. and it participated in the proceeding below.

³ The staff undertook to do Alpine's study on its own. Id.

SERVICE (id. at para. 8-10); and

(c) the staff's Decision, granting Alpine's 1998 proposal to move its "Class C" station from Wallace, ID -- even though it subsequently was licensed at Wallace as a "Class C-2" facility -- unlawfully denied the public any opportunity to comment on the changed proposal and must be reconsidered as a matter of law.

In sum, the staff's Decision is capricious and without substantial evidentiary support and, thus, should be reconsidered, set aside and reversed.

BACKGROUND

The factual background of this proceeding was presented in the Decision (id. at para. 4-5). Additional facts are presented, however, to provide a complete record in this odd proceeding.

After BBI filed an Opposition that (i) questioned whether Bigfork was a "community for allotment purposes" and (ii) detailed the significant "white" area that KSIL would abandon in Idaho should the "Class C" facility be re-allocated to Bigfork, MT,⁴ Alpine filed an application to downgrade its unbuilt Idaho facility from "Class C" to "Class C-2." Moreover, after a C-2 permit was granted and Alpine constructed the downgraded KSIL facility in Idaho, this remained a proceeding that proposed to reallocate a "Class C" facility from Wallace, ID to Bigfork, MT. Furthermore, no "public notice" was ever given by the FCC that Alpine's rulemaking proposal (to delete channel 264C from

⁴ That Opposition to the Bigfork re-allotment was withdrawn, however, after BBI was "reminded" in a pleading filed by Alpine that BBI was a dues-paying member of the Bigfork chamber of commerce.

Wallace, ID) had been altered or that Alpine now intended to delete a Class C-2 channel in Idaho. Thus, no opportunity for public comment ever was provided by the FCC for the changed rulemaking proposal.

ARGUMENT

I. THE STAFF'S DECISION UNLAWFULLY RELIEVES ALPINE OF ITS EVIDENTIARY BURDEN

As the staff's Decision notes (at para. 6), the "Gain/Loss" study submitted by Alpine was deficient in several material respects. First, Alpine's study erred in calculating the Bigfork "gain area" on the basis of assumed maximum Class C facilities. The correct measurement should have been based on predicted minimum Class C facilities. See Greenup, KY, 6 FCC Rcd 1493, 1497 at note 7 (1991).

Second, Alpine's study premised its "loss area" on the basis of an assumed Class C facility at Wallace, ID. But, after its study was submitted, Alpine downgraded its unbuilt Wallace, ID facility from "Class C" to "Class C-2." It then constructed KSIL-FM as a Class C-2 facility; however, Alpine never amended its "Gain/Loss" study or filed a new study in its rulemaking proceeding to reflect the changed, material facts. At that point, Alpine's evidentiary showing in the rulemaking was fatally defective. It had failed to carry the burden of proof established by the NPRM (to present an accurate "gain/loss" study that would show the areas and population in Idaho "that will lose potential service"). Id. at para. 6.

The staff's Decision arbitrarily and unlawfully relieves Alpine of its evidentiary burden without any reasoned explanation whatsoever.

II. THE STAFF'S DECISION GRANTING ALPINE'S PROPOSAL TO ABANDON SIGNIFICANT "GRAY AREA" SERVICE IN UNDER-SERVED AREAS OF IDAHO IS UNLAWFUL AND CAPRICIOUS

Alpine's February 24, 1998 Petition for Rulemaking proposed the deletion of channel 264C at Wallace, ID from the FCC's rules and the re-allotment of that unbuilt facility from an under-served area of Idaho to a well-served area of Montana. Indeed, Alpine's own engineering exhibit demonstrated that the "gain area" in Montana was already well-served by six (6) FM and four (4) AM stations. See Figure 2 to Comments of Alpine Broadcasting Limited Partnership, filed October 26, 1998.

After BBI's Opposition noted that significant "white and gray areas" would be unlawfully abandoned in Idaho by such an out-of-state move of the unbuilt station, Alpine filed an application to downgrade its unbuilt station, i.e., to reduce the unbuilt station's proposed service to under-served areas of Idaho. It subsequently constructed that downgraded facility and KSIL-FM was licensed as a C-2 FM station at Wallace, ID earlier this year. See File No. BLH-20001215AAZ, granted March 13, 2001.

While Alpine's strategic downgrade of KSIL (after BBI's opposition) did reduce somewhat the extent of its "service loss" in Idaho for purposes of the pending rulemaking proceeding, Alpine's gamesmanship did not reduce completely the serious "service loss" problem noted by BBI earlier in the proceeding. Indeed, even the staff's Decision notes that KSIL's approved change of community will still result in the loss of service to at least "150" persons in

Idaho, who would be left with only ONE (1) fulltime aural service, i.e., a "gray area" containing at least one hundred and fifty persons. The staff's Decision also is constrained to concede that at least one quarter of KSIL's existing Idaho service area is already underserved. (Decision at para. 8).

Given the imperative of Section 307(b) of the Act and the FCC's long fidelity to that mandate, the Decision's approval of Alpine's proposed change of community -- in the face of such loss of service to under-served populations -- is manifestly unlawful, capricious and an abuse of discretion. See Wallace, Idaho and Lolo, MT (MM Docket No. 97-203), released November 30, 1999 (denied move of FM from under-served area of Idaho to well-served suburb of city in Montana because, inter alia, it would deprive numerous persons in "gray" area of second fulltime aural service).

It long has been the FCC's highest FM allocation priority to provide under-served areas and populations with new FM service. See Revision of FM Assignment Policies & Procedures, 90 FCC 2d 88, 92 (1982). Indeed, the FCC noted over ten years ago that there are virtually NO areas of the country left without one or two fulltime aural services. See Change of Community, 5 FCC Rcd 7094, 7096 (1990). In fact, in the FCC's hierarchy of FM assignment values, providing a second fulltime aural service (service to "gray areas") is Priority #2. Id., 90 FCC 2d at 90-92.

In its Decision, the staff not only departs from agency policy and the statutory mandate of Section 307(b) but sacrifices the Section

307(b) interests of at least 150 persons residing in rare, under-served "gray areas" of KSIL's existing Idaho service. Cf. Pecos and Wink, TX (MM Docket No. 97-235), released February 12, 1999 (denied move of FM from under-served area).

III. THE STAFF'S DECISION UNLAWFULLY DEPRIVES THE PUBLIC OF ANY OPPORTUNITY TO COMMENT ON THE PROPOSAL THAT IT ULTIMATELY ADOPTED

The rulemaking proposal that was granted on May 11, 2001 by the staff's Decision was not the same proposal advanced by Alpine's February 1998 Petition for Rulemaking.

As noted in the NPRM, Alpine proposed to amend the FCC's rules by deleting an (unbuilt) Class C facility at Wallace, ID and adding to the FCC's Table of FM Allotments a new Class C facility at Bigfork, MT. Id. at para. 9. The public was asked to comment on that proposed deletion of a Class C facility at Wallace and/or to comment on the proposed addition of a Class C facility at Bigfork, MT.

After objections were raised by BBI regarding the proposed deletion of a Class C facility in the under-served Wallace, ID market, Alpine cleverly responded by downgrading its unbuilt Wallace, ID facility and becoming licensed as a C-2 station in Idaho, thereby eliminating the previously proposed service to "white areas" - areas to which it would have provided the ONLY fulltime service. That way, KSIL would never serve any "white area" in Idaho and, thus, could not be disadvantaged in the pending rulemaking by abandoning any "white area" as a result of the move of its station to Montana.

Although its gamesmanship did not relieve Alpine completely of the serious problem of abandoning service to under-served areas (see Argument II, supra), it also created two new problems that the staff's Decision ignores altogether. First, after it downgraded KSIL and became licensed as a C-2 station, Alpine never amended its rulemaking proposal that the FCC delete "channel 264C at Wallace, ID". Thus, the Decision's purported deletion of channel 264C2 (id. at para. 12) was, in fact, never proposed by the petitioner in this proceeding. Alpine's failure to amend its proposal violates Section 1.401c of the FCC's rules (petitioner must set forth the exact nature of its proposed rule).

Second, this is not "harmless" error that the staff might have lawfully excused, even assuming its Decision had reasonably explained such unusual "forgiveness." Rather, the error has denied the public a fundamental right in administrative proceedings. The NPRM gave notice to the public of a proposed deletion of channel 264C at Wallace, ID (id.). Because this rulemaking has consistently proposed only the deletion of "channel 264C" at Wallace (NPRM, supra), the public never has had any opportunity to comment on Alpine's revised proposal to delete a "Class C-2" allotment at Wallace. This deprivation is not of a technical nature only.

Indeed, the public should have the right to comment on whether even Alpine's reduced service area should lose its service, versus the addition of a new service to well-served Bigfork, MT. The public might want to file a counterproposal, arguing that the public interest

would be better served by allocating two new Class A facilities as "first local services" rather than allocating only one new Class C as a "first local service" to a well-served area. Or the public might even be able to show that the "loss area" in Idaho contains more than 150 persons who would be left with only one fulltime service; or the public might be able to show that, in fact, there would be a loss of "white area" service from the deletion of KSIL's C-2 facility at Wallace, ID.

In short, after KSIL became licensed as a "Class C-2" facility at Wallace, ID, its failure to amend its pending rulemaking proposal left the FCC's NPRM fatally defective. See 47 CFR 1.413c (notice of proposed rule amendment must include the exact terms of the proposed rule change). At that point, the staff should have issued a further notice and given the public an opportunity to comment on the changed proposal. See 47 CFR 1.421. The staff's issuance of a Decision two months after KSIL was licensed as a C-2 station at Wallace, ID -- instead of issuing a further notice and giving the public an adequate opportunity to comment on the Petitioner's changed proposal -- is reversible error.

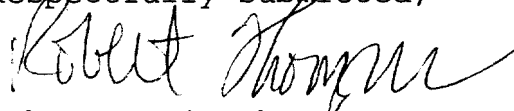
In sum, the public is guaranteed by law the right to comment on an FM rulemaking proposal before that proposal is granted. If a rulemaking proposal is published in an NPRM but then changed after the comment and reply comment period is closed, then -- like a counterproposal -- an additional opportunity for comment must be provided. Notwithstanding any other error in the staff's Decision,

this procedural and substantive defect warrants reconsideration.

CONCLUSION

The staff's Decision should be reconsidered, set aside and reversed. The rulemaking proceeding should be reopened, a new public notice should be issued, the public should have an opportunity to comment on the proposed deletion of a Class C-2 facility at Wallace, ID, and the FCC should reach a new decision based on all of the relevant factors and agency precedent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Thompson", written over the typed name.

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June 11, 2001

CERTIFICATE OF SERVICE

I, Robert Lewis Thompson, do certify that on this 11th day of June, 2001, I served a copy of the foregoing Petition for Reconsideration by prepaid first class mail on counsel of record below:

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A handwritten signature in black ink, appearing to read "Robert Thompson", with a stylized flourish at the end.

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